Office-Supreme Court, U.S.
FILED
DEC 17 1984
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-632

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

ALLAN WILK and PALOS VERDES SHORES MOBILE ESTATES, LTD.,
Appellants,

VS.

PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Appellate Department of the Superior Court, State of California, County of Los Angeles

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO AFFIRM

GARY R. NETZER,
City Attorney
JACK L. BROWN,
Deputy City Attorney
1600 City Hall East
200 North Main Street
Los Angeles, California
90012
Telephone: (213) 485-5483
Attorneys for Appellee People of the State of California

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

BEST AVAILABLE COPY

28 pp

TABLE OF CONTENTS

	Page
Introduction	1
Statement of the Case	2
Argument	7
I	
The specific constitutional challenges advanced by appellants to this Court have never been presented to the state court and are being presented to this Court for the first time. As such, this Court's jurisdiction under 28 U.S.C. section 1257(2) cannot be invoked	7
II	
Even if there were no jurisdictional impediment, review of the issues raised by appellants is not possible since those issues rely upon a state of facts controverted by the record below	9
III	
The issues framed by the facts are not substantial	11
Conclusion	12
Appendix	A-1

TABLE OF AUTHORITIES CITED

Cases

	Page
Adler v. Board of Education, 342 U.S. 485 (1952)	7, 8
Cardinale v. Louisiana, 394 U.S. 437 (1969)	7
Fidelity & Casualty Co. v. Abraham, 70 Cal.App.2d 776 (1945)	3
Hedgebeth v. North Carolina, 334 U.S. 806 (1948)	10
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940)	7
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941)	9
Murgia v. Municipal Court, 15 Cal.3d 286 (1975)	4, 8
New York ex. rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)	8
Oyler v. Boles, 368 U.S. 448 (1962)	8
People v. Manning, 33 Cal.App.3d 586 (1973)	3
People v. Superior Court (Keithley), 13 Cal.3d 406 (1975)	3
Two Guys v. McGinley, 366 U.S. 582 (1961)	8
United States v. Nixon, 418 U.S. 683, 693(1974)	11
White River Lumber Co. v. Arkansas ex. rel. Applegate, 279 U.S. 692 (1928)	7
Wilson v. Cook, 327 U.S. 474 (1946)	7

Statutes

28 U.S.C. section 1257(2)	7, 9
Los Angeles Rent Moratorium Ordinance, LAO 151, 415	*passim*

Miscellaneous

Jurisdictional Statement	*passim*

No. 84-632

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

ALLAN WILK and PALOS VERDES SHORES MOBILE ESTATES, LTD.,
Appellants,

VS.

PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From
the Appellate Department of the Superior Court,
State of California, County of Los Angeles

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO AFFIRM

INTRODUCTION

Appellants stand convicted of violating the provisions of a Los Angeles city interim rent control ordinance which was in existence for seven months during the latter part of 1978 and the early part of 1979. Enacted by the City Council of Los Angeles, the purpose of this moratorium ordinance ("Ordinance") was to maintain the status quo vis-a-vis rent levels in Los Angeles, pending development and implementation of a permanent rent control ordinance.

Though the Ordinance provided for criminal penalties upon a violation of its provisions, compliance with the Ordinance was considered paramount. To that end, if it were clear that a particular landlord's failure to comply with the Ordinance was based upon his ignorance of its provisions, then procedures, including the possibility of an informal office hearing, were instituted to apprise the landlord of his obligations under the Ordinance. However, if it were clear that a landlord was familiar with the requirements of the Ordinance but was nevertheless violating its provisions, then the educational function served by the informal procedures would be superfluous, and criminal charges would be filed.

Of the ten criminal complaints that were filed alleging violations of the Ordinance, three were against landlords who, though fully aware of its provisions, were nonetheless charging rents in excess of those legally permitted. Appellant was one of these three.

Irrespective of appellants' contentions to the contrary, criminal charges were instituted without benefit of an office hearing because, in blatant disregard of provisions of the Ordinance of which Mr. Wilk ("Wilk") was clearly aware, he elected to collect illegal rents. The uncontroverted evidence presented to the trial court below reflects that Mr. Thomas Todd, the Deputy City Attorney having primary filing responsibilities, and his immediate supervisor, Mr. George Eskin, made the filing decision in this case based solely on this factor. The record contains no evidence to suggest, let alone support, appellants' baldfaced assertion that charges were filed against them based upon Wilk's vocal opposition to the Ordinance.

STATEMENT OF THE CASE

Appellants' statement of the case presented in the Jurisdictional Statement is seriously flawed. In addition to the considerable factual misrepresentations made, it

consists of a mix of facts that were both considered by the trial court at the pretrial motion to dismiss, as well as facts which were outside the record of that pretrial hearing and which were adduced at the trial on the merits which occurred at a subsequent point in time.

All of appellants' challenges to the Ordinance were made during the course of the pretrial hearing denominated a motion to dismiss. Accordingly, the facts which this Court should consider in ruling on appellant's claims are those facts presented to the trial court during this pretrial motion, and which were undisputed, or which were part of the express findings made by the trial court at this proceeding, or which are necessarily implied by the trial court's ruling on that motion. (*People v. Superior Court (Keithley)* (1975) 13 Cal.3d 406, 410; *Fidelity & Casualty Co. v. Abraham* (1945) 70 Cal.App.2d 776, 782; *People v. Manning* (1973) 33 Cal.App.3d 586, 601-603.) These are the facts considered by the Appellate Department of the Superior Court when reviewing the constitutional issues advanced by appellants at the pretrial motion. A statement of those facts appears in Appendix A of the Jurisdictional Statement at App. 1-10.[1] Because these are the only facts which the state courts considered when ruling on these issues, appellee incorporates by reference these selected pages from Appendix A into the instant pleading.

The pretrial motion to dismiss was instituted by appellants' filing their pleading entitled "Defendants' Pretrial Motion to Dismiss."[2] Filed in the trial court, it contained

---

[1] References to documents contained in the appendix to the Jurisdictional Statement will be cited as "Appendix," followed by the letter designating the particular portion of the appendix and the page number of that portion, cited as "App."

[2] Relevant portions of this document are contained in the APPENDIX. References to this document will be cited as "APPENDIX, App.," followed by the number designating the appropriate page number.

the only constitutional arguments advanced by appellants and considered by the court below.[3]

The only constitutional claim advanced which is remotely related to any of those advanced before this Court was a claim that the City Attorney's Office was guilty of "purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis," thereby triggering the doctrine of discriminatory enforcement as articulated by the California Supreme Court in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 297. Appellants summarized the issue as follows: "... regardless of the degree of protest to laws, it is improper criminally to prosecute an individual simply because he has exercised constitutional rights to protest laws he finds objectionable. That is the situation presented here; the proper remedy is dismissal of the action." (APPENDIX, App. 12.)

The only direct constitutional attack on the validity of the Ordinance was a vagueness argument phrased by appellants as follows: "The provisions of the ordinance relied upon to support these charges are void for vagueness." (APPENDIX, App. 3.) Appellants proceeded to argue that some of the language of the Ordinance lacks the clarity and certainty which is required of statutes imposing criminal liability.

---

[3] The only other pleading filed by appellants was entitled "Defendants' Rely to People's Opposition to Motion to Dismiss." This reply, however, contained no additional constitutional challenges not raised in their initial pretrial motion to dismiss. The record of the pretrial motion to dismiss reflects appellants' and the court's reliance on these pleadings. (See RTM (1A) 3.) Though appellants presented oral argument during the dismissal hearing, no additional constitutional theories or claims were advanced beyond those contained in their initial pleading. NOTE: References to the reporter's transcript of Appellants' Pretrial Motion to Dismiss will be cited as "RTM," followed by the appropriate transcript volume and page number.

These and the additional grounds advanced to support the claim that the complaint should be dismissed (see Appendix I, App. 2-3) were made during the course of the pretrial dismissal hearing conducted during the latter part of June 1982. This hearing was in no way connected with the subsequent trial on the merits. In particular, evidence adduced at the trial was not considered by the judge when he denied the pretrial motion to dismiss. It was only after the conclusion of this pretrial motion that the trial on the merits was held, at which time appellants were convicted of some of the alleged charges.

Significantly, though Wilk testified at trial, *he did not testify during the course of the pretrial motion to dismiss.* Since his testimony was considered neither by the trial court nor by the Appellate Department of the Superior Court when testing the validity of the trial court's refusal to dismiss the charges, likewise it should not be considered by this Court when ruling on appellants' constitutional claims.

By liberally sprinkling throughout the Jurisdictional Statement representations purportedly made by Wilk, conduct allegedly carried out by Wilk, and Wilk's state of mind during the course of the latter part of 1978 and early part of 1979 when criminal charges were contemplated and ultimately filed against him, appellants seek to present facts outside the record which are clearly inappropriate for consideration by this Court. In particular, all references made to the reporter's trial transcript, identified as "RT" in the Jurisdictional Statement, should never have been included in that statement and, for purposes of this Court's review of the facts presented to the state court, should be excised. (See Jurisdictional Statement, p. 6, n. 2.)

In addition to their including in the Jurisdictional Statement matters outside the trial court's record of the relevant proceeding, appellants as well grossly misstate

and "massage" facts which were properly considered by the trial court. What follows is an identification of some of the more egregious examples of these misrepresentations.

1. The rent ordinance filing guidelines and case procedures (Appendices H and I, App. 36, 38) were developed by the City Attorney's Office for internal use by the city's Housing Services Division and by attorneys responsible for filing criminal charges under the Ordinance. They were not a part of the Ordinance passed by the Los Angeles City Council, and the Los Angeles City Council had no role in their development or implementation. Clearly, these procedures and guidelines are not statutory law. (See, e.g., Jurisdictional Statement, p. iii.)

2. The undisputed evidence presented during the course of the pretrial motion reflects that the decision to file criminal charges against Wilk resulted from his clearly expressed intent to continue to violate the terms of the Ordinance notwithstanding his clear understanding of the requirements for compliance. Mr. Todd's decision to file charges, concurred in by his supervisor, Mr. Eskin, was based upon two primary sources of information: Todd had been in continual contact with the head of the tenants' association at the mobile home park and was provided with updated information concerning Wilk's conduct toward those tenants on a regular basis; and Todd had received and had carefully examined Wilk's letter of August 24th.[4] (Appendix A, App. 4; Appendix J, App. 40.) Whatever else Wilk had been doing to propel himself into the public's eye as an opponent of rent control, these factors were irrelevant to Todd and Eskin. (Appendix A, App. 5, 7.)

---

[4]This letter and Wilk's September 25th letter were sent to the tenants who lived at Wilk's mobile home park. Though Wilk appears to have presented one or more copies of either or both letters to the City Council, they were addressed and sent to the tenants.

3. Appellant was one of three persons who were not accorded an office hearing prior to having criminal charges instituted against them. Since it was apparent that all three landlords were charging unlawful rents notwithstanding their awareness of the provisions of the Ordinance, conducting an office hearing in their cases to apprise them of the terms and conditions of the Ordinance would accomplish no meaningful purpose. Accordingly, Wilk's claim that he alone was singled out for disparate treatment is factually incorrect. (Appendix A, App. 3.)

ARGUMENT

I

THE SPECIFIC CONSTITUTIONAL CHALLENGES ADVANCED BY APPELLANTS TO THIS COURT HAVE NEVER BEEN PRESENTED TO THE STATE COURT AND ARE BEING PRESENTED TO THIS COURT FOR THE FIRST TIME. AS SUCH, THIS COURT'S JURISDICTION UNDER 28 U.S.C. SECTION 1257(2) CANNOT BE INVOKED.

This Court's well established rule provides that a constitutional question not presented to and not passed upon by the state court will be excluded from consideration when it is sought to be raised for the first time before this Court. (*White River Lumber Company v. Arkansas ex. rel. Applegate,* 279 U.S. 692, 700 (1928); *Adler v. Board of Education,* 342 U.S. 485, 496 (1952); *Wilson v. Cook,* 327 U.S. 474, 483-484 (1946).) A federal question neither raised nor passed upon in the state courts will not be considered by this Court. (*Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434-435 (1940).)

In order to invoke this Court's appellate jurisdiction pursuant to 28 U.S.C. section 1257(2), there is the

additional requirement that a state court must have upheld the validity of a state statute against the very constitutional claim advanced on appeal to this Court. (*New York ex. rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928); *Adler v. Board of Education, supra,* 342 U.S. at 496.

Appellants leveled a facial attack against the Ordinance on vagueness grounds (APPENDIX, App. 3), and an attack against the allegedly discriminatory enforcement policy of the City Attorney's Office based on *Murgia v. Municipal Court,* 15 Cal.3d 286 (1975). (APPENDIX, App. 2, 4-12,). Evidence presented at the pretrial hearing related solely to this latter ground.[5]

The *Murgia* issue is qualitatively different from the issues advanced before this Court. Based on this Court's prior holdings in *Oyler v. Boles,* 386 U.S. 448 (1962), and *Two Guys v. McGinley,* 366 U.S. 582 (1961), *Murgia* condemns an enforcement scheme which intentionally singles out individuals for "disparate treatment on an invidiously discriminatory basis." *Murgia v. Municipal Court, supra,* 15 Cal.App.3d at 297. To support his claim that he was singled out for prosecution, Wilk presented four separate types of evidence:

> 1. Evidence that he was not provided prior notice or an office hearing;
>
> 2. Evidence that no demand letter had been sent to him;
>
> 3. Evidence that no other landlord was charged without a prior office hearing; and

---

[5]There was additional testimony presented to support appellants' claim that the Ordinance resulted in confiscatorily low rents. The confiscation issue, however, is not relevant to any issue before this Court.

4. Evidence that "the People broke their promise" to give him an office hearing. (APPENDIX, App. 2, 5-11.)

Thus, Wilk never alleged any constitutional infirmity with the office hearing procedure. His sole claim was that the failure to provide him an office hearing, when all other persons were provided one, is evidence that he was singled out for prosecution.

It is the singling out for prosecution — not the denial of the office hearing procedures — that formed the basis of Wilk's constitutional claim below. The trial court was never asked to pass on the constitutionality of the office hearing procedure; rather, it was argued that the prosecutor's failure to follow its own procedures *was evidence* that Wilk was singled out for prosecution.

On appeal to this Court, Wilk for the first time questions the facial validity, and the validity as applied to him, of the enforcement procedures used to file charges alleging violations of the Ordinance. Since these questions were never presented to the state court, pursuant to 28 U.S.C. section 1257(2) this Court lacks jurisdiction to consider them.

II

EVEN IF THERE WERE NO JURISDICTIONAL IMPEDIMENT, REVIEW OF THE ISSUES RAISED BY APPELLANTS IS NOT POSSIBLE SINCE THOSE ISSUES RELY UPON A STATE OF FACTS CONTROVERTED BY THE RECORD BELOW

The factual problems inherent in this case preclude review of the issues as framed by appellants. Clear from this Court's opinion in *Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U.S. 287 (1941), is the rule that all factual disputes are to be resolved by the state courts; this Court will involve itself in a review of the facts only in certain extreme circumstances of which this

case is not one. In essence, this Court is "bound by the record on which [the state court] judgment is based." *Hedgebeth v. North Carolina* 334 U.S. 806, 807 (1948).

Both of the two claims advanced by appellants rely upon a very specific set of facts. Since the facts necessary to frame these issues are controverted by the record below, the factual record necessary before the issues can be considered by this Court does not exist.

The first issue presumes an enforcement system providing for prosecution, rather than the office hearing procedures, whenever there is vocal protest and objectionable public statements concerning the Ordinance. (See Jurisdictional Statement, "Questions Presented.") The internal guidelines and procedures do not support these factual assumptions.

Pursuant to these guidelines and procedures, the office hearing alternative to prosecution would be unavailable in certain situations, among them being when the "landlord is adamant in refusing to comply with the law." (Appendix H, App. 37). Nowhere on the face of either of the documents is there even the suggestion that one's outspoken opposition to the Ordinance will result in the filing of criminal charges.

Wilk's second claim is that he was denied the opportunity to be party to an office hearing solely because his protest to the Ordinance was deemed " 'outrageous' and 'bizarre' in content." (See Jurisdictional Statement, "Questions Presented") The uncontroverted evidence belies this assertion. The sole basis for the filing decision against appellants was Wilk's refusal to comply with the law. (Appendix A, App. 5, 7.) Wilk's letters of August 24th and September 25th (Appendices J, K, App. 40, 41) sent to his tenants, relied upon by Todd and Eskin, clearly support their conclusion. Far from evidencing any uncertainty as to the meaning of the Ordinance, these

letters establish beyond doubt that Wilk knowingly violated its provisions. Though Wilk later claimed when he testified at trial that he was outspoken and used many forums to rail against the Ordinance, these facts and his testimony were not presented during the pretrial motion to dismiss. Accordingly, they cannot provide the factual succor necessary in order for this Court to consider the issue.

III
THE ISSUES FRAMED BY THE FACTS ARE NOT SUBSTANTIAL

After due consideration is given to the factual record below, the only question which could be considered by this Court is whether it is constitutional for a prosecutor to base the filing decision on a likelihood that a violator, ignorant of the provisions of a local ordinance, will comply with the law after becoming aware of its terms. As applied to Wilk, the issue becomes whether any constitutional infirmity surrounded the filing of criminal charges against a person whose communications to his tenants left no doubt that he was fully aware of the applicable rent control ordinance, and yet who chose to violate its terms. Though a defendant cannot normally rely upon his ignorance of the law as a defense to criminal charges, there is no symmetry to this legal principle which precludes a prosecutor's use of a suspect's knowledge of the law when making the filing decision. The broad discretion residing in the executive branch, recognized by this Court in *United States v. Nixon,* 418 U.S. 683, 693 (1974), clearly allows a prosecutor to forego filing criminal charges against someone who committed the criminal act because of his ignorance of the law. Though the issues as framed by appellants may be more interesting than this issue, as previously argued they are not properly before this Court. And the only remaining question is not substantial, having been fully considered by this Court in *Nixon.*

CONCLUSION

The issues framed by appellant rely upon a set of facts never considered by the state court when ruling upon the constitutionality of the Ordinance. Combining misrepresentations of evidence presented at the pretrial motion with evidence never presented to nor considered at that hearing, the factual record relied upon by appellants when framing the issues before this Court cannot withstand even superficial scrutiny. As a result, the constitutional challenges purportedly made by appellants to the state courts were in fact never made, precluding review of these issues. The only remaining issue reflected by the actual facts presented to the court below involves a question of prosecutorial discretion already resolved by this Court. For these reasons, this Court should dismiss this appeal, or in the alternative, should affirm the decision of the state court below.

Respectfully submitted,

GARY R. NETZER,
City Attorney
By JACK L. BROWN,
Deputy City Attorney
1600 City Hall East
200 North Main Street
Los Angeles, Calif. 90012
Counsel of Record

APPENDIX

No. 31118020
Date: April 29, 1982
Time: 9:00 A.M.
Division 1

DOUGLAS DALTON
CYRUS V. GODFREY
3660 Wilshire Boulevard
Suite 230
Los Angeles
California 90010
(213) 386-1515

JOSEPH R. AUSTIN
WILLIAM C. SCHWEINFURTH
TUTTLE & TAYLOR INCORPORATED
609 South Grand Avenue
Los Angeles
California 90017
(213) 683-0600

Attorneys for Defendants
Palos Verdes Shores Mobile Estates,
Ltd., Allan Wilk, Harold C. Hohlman

In the Municipal Court of the State of California
Los Angeles Judicial District

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

PALOS VERDES SHORES MOBILE ESTATES,
LTD., ALLAN WILK, HAROLD C. HOHLMAN,
Defendants.

DEFENDANTS' PRETRIAL MOTION TO DISMISS

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I	
FACTUAL BACKGROUND	6
A. Defendants' Business Activities	6
B. Circumstances Precipitating and Nature of Charges Against Defendants	10
C. Procedural History of Criminal Action	18
II	
DEFENDANTS' PRETRIAL MOTION TO DISMISS IS A PROPER MEANS TO TERMINATE THIS PROSECUTION	20
III	
THE PROSECUTION OF DEFENDANTS WAS SELECTIVE AND DISCRIMINATORY IN VIOLATION OF DEFENDANTS' CONSTITUTIONAL RIGHTS	21
A. Summary of Controlling Authorities	21
B. Evidence of Selective and Discriminatory Prosecution	24
1. No prior notice or hearing	24
2. No demand letter	28
3. No other landlord was charged without a prior office hearing	28
4. The People broke their promise to give Defendants a hearing	29
C. Conclusion	30
IV	
THE CHARGES AGAINST DEFENDANTS AND THE PENALTIES SOUGHT ARE INVALID	31

TABLE OF CONTENTS

Page

A. The Alleged Acts Do Not Violate the Rent Moratorium Ordinance 31

1. Rent increases to new residents 32

2. The golf course counts 38

3. The voluntary vacancy counts 41

B. The Provisions of the Ordinance Relied Upon to Support these Charges Are Void for Vagueness 42

C. The Penalty Provisions of the Ordinance Are Invalid 46

V

PROSECUTION IS BARRED BY THE CONSTITUTIONAL TOLLING PRINCIPLE. 53

A. Summary of Controlling Authorities 53

B. Defendants' Prior Judicial Challenge to the Rent Moratorium Ordinance Precludes the Tolling Period 58

VI

AS APPLIED, THE RENT MORATORIUM ORDINANCE WAS INVALID BECAUSE IT FORCED DEFENDANTS TO SUFFER UNCONSTITUTIONAL CONFISCATION OF PROPERTY 60

A. Summary of Controlling Authorities 60

TABLE OF CONTENTS

		Page
B.	Facts of Confiscation	62
	1. Because of the prior history of the Park, PVS had to make substantial repairs and improvements while rents remained extraordinarily low.	63
	2. By any measure, the continuation of low rental rates imposed on Defendants by the Ordinance resulted in confiscation.	65
CONCLUSION		71

[Table of Authorities omitted.]
[Introduction omitted.]
[Irrelevant portions of argument omitted.]

III

THE PROSECUTION OF DEFENDANTS WAS SELECTIVE AND DISCRIMINATORY IN VIOLATION OF DEFENDANTS' CONSTITUTIONAL RIGHTS.

A. Summary of Controlling Authorities.

A criminal case should be dismissed in the pretrial stages when a defendant demonstrates "that he has been deliberately singled out for prosecution on the basis of some invidious criterion." *Murgia v. Municipal Court,* 15 Cal.App.3d 286 (1975). As *Murgia* explains: "[T]he equal protection guarantee simply prohibits prosecuting officials from purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis." 15 Cal.App.3d at 297.

To prevail on a defense of discriminatory prosecution, a defendant must establish two elements:

> "1) He must show that he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted;" [and]
>
> "2) He must show that the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race, religion, or *his exercise of his first amendment right to free speech."* (Emphasis added.) *United States v. Catlett,* 584 F.2d 864, 866 (8th Cir. 1978). *People v. Battin,* 77 Cal.App.3d 635, *cert. denied sub nom. Battin v. California,* 439 U.S. 862 (1978).

Defendants submit that both requirements are met in this case. They will show that, of the 653 incidents investigated by the City Attorney's Office, no person has been criminally charged with a violation of the Moratorium Ordinance without a prior hearing on the alleged violation. Defendants will also show that the reason for this discrimination was Defendant Wilks' active political opposition to the Ordinance and Defendants' efforts to have the ordinance invalidated in a court of law.

United States v. Falk, 479 F.2d 616 (7th Cir. 1973) involved a protest of laws very similar to the protest staged by Defendants here. Falk was an active member of a draft counseling organization known as the Chicago Area Draft Resisters. At trial, he made an offer of proof (which was refused) that the government had stated to Falk's attorney that they knew of his draft counseling activities, that a good deal of their trouble in enforcing the draft laws came from people such as Falk, that few indictments were brought for non-possession of draft cards, and that defendant's draft-counseling activity was one of the reasons why the prosecution for non-possession was brought. *Falk,* 479 F.2d at 621. Falk's conviction was reversed for a hearing on this issue.

Falk also teaches that, in cases such as these, where Defendants have made a prima facie showing that their prosecution is the result of invidious discrimination, the burden is on the people to prove nondiscriminatory enforcement of the law. *Falk,* 479 F.2d at 621.

B. Evidence of Selective and Discriminatory Prosecution.

1. No prior notice or hearing.

It is and has always been the City's policy and practice to give landlords informal notice of complaints received and to hold informal hearings with alleged violators of rent control ordinances prior to the filing of any criminal charges.[23] The purpose of such hearings was to air any differences of misunderstandings between the City and landlords concerning interpretation and application of the ordinances, and to give landlords a chance to conform to the law's requirements without criminal prosecution.[24] No such informal notice or hearing was given in this case. In fact, Defendants were not even interviewed prior to the filing of the complaint.[25]

The lack of notice to Defendants and the failure to provide an office hearing is a clear violation of the City

---

[23]*See, e.g.*, Exhibit X* (newspaper articles discussing use of hearing procedure), Exhibit Y* (which includes the "Rent Roll-Back and Freeze Ordinance Case Procedures", documents to be mailed to the landlord re alleged violations, special forms to track the cases through the hearing process, and the "Rent Ordinance Filing Guidelines"), Exhibit Z* (entitled "Landlord Reply Form"), Exhibit AA* (documents from an actual case, including: Community Development Department form advising landlord that tenant has filed a complaint; City Attorney form entitled "Request For Office Hearing; and completed Landlord Response to A Tenant complaint"); and Exhibit BB* (documents from the file of one of the sixteen landlords who actually were prosecuted under the Ordinance, including letter from City Attorney requesting landlord's attendance at an office hearing and completed Landlord Reply Form.)

[24]*See, e.g.*, September 29, 1978 letter from City Attorney Burt Pines to Councilman Joel Wachs, at page 2. (A copy of this letter is attached as Exhibit CC* of Defendants' Pretrial Exhibits.) *See also* Exhibit X* of Defendants Pretrial Exhibits.

[25]*See* Exhibit W, at page 1.

Attorney's own written policy regarding tenant reports of possible violations of the rent control laws. *See* "Rent Roll-Back and Freeze Ordinance Case Procedures", Exhibit Y* of Defendants' Pretrial Exhibits. The only circumstances authorizing the City Attorney's Office to disregard the notice and hearing procedures and to file a complaint without a hearing involved so-called "aggravated" cases. The City Attorney's own "Case Procedures" defined an "aggravated" case as one in which (1) prior office hearings had already been held with the landlord or (2) the landlord was adamant in refusing to comply with the law. Neither of the two defined aggravated circumstances existed in the case at bar.

Lack of informal notice and of a hearing is particularly significant here for had these established procedures been followed, they may well have accomplished what they were intended to do — resolve the dispute without courtroom proceedings. For example, when the Ordinance was originally enacted, it did not apply to the rental of mobilehome ground spaces; it was later amended to cover such rentals. Some of the counts filed were for conduct before the Ordinance was so amended. When this was pointed out, those counts were dismissed. Moreover, after the complaint was filed, rent refunds were voluntarily made by Defendants to the affected residents.[26] The remainder of the charges could well have been similarly resolved in the hearing process. this seems particularly true of the courts which involve such questions as whether the golf course next to the park is an "essential housing service" and thus subject to rent control.

What was the reason, then, for the lack of informal notice and hearing that everyone else received? Notes by

---

[26]Test at p. 16 *supra*. *See e.g.*, Exhibit R of Defendants' Pretrial Exhibits.

Deputy City Attorney Susan Pfann of her conversation with Deputy City Attorney Thomas Todd record Mr. Todd as saying that no hearing was given to Defendants because no matter what they said "we would file anyway."[27] These notes reflect Mr. Todd as stating that Defendant Wilk was "flaunting" the law and "knew" his conduct was unlawful. To our knowledge, Defendants had never heard of Mr. Todd before the criminal complaint was filed and of course had never had an opportunity to discuss the alleged violations with Mr. Todd. How then could Mr. Todd have concluded that Defendants were "flaunting" the law and how could Mr. Todd legitimately claim that Wilk "knew" he was violating the Ordinance? Even assuming the truth of Mr. Todd's wholly uninformed assumptions, why would he have prosecuted "anyway", particularly if after a hearing, Defendants had agreed to comply with the City's interpretation of the Ordinance and to make restitution?

Defendants can think of no reason for these decisions by the City Attorney's Office other than the expressed desire to punish Defendants for actively and publicly expressing their views in opposition to rent control and challenging the Ordinance in court. The law is clear that such prosecutions violate the First and Fourteenth Amendments and are unconstitutionally discriminatory.

2. **No demand letter.**

It is also the practice of the City Attorney, even in egregious cases, to send a compliance letter to a suspected violator of the rent control law, asking them to correct the asserted irregularity. An example of such a letter is attached as Exhibit EE* of Defendants' Pretrial Exhibits. Defendants were never sent a compliance letter.

---

[27]A copy of Ms. Pfann's notes of her conversation with Mr. Todd is attached as Exhibit DD* of Defendants' Pretrial Exhibits.

This failure to follow a procedure that was used with every other suspected violator is further evidence of wrongful motive by the prosecution.

3. No other landlord was charged without a prior office hearing.

Defendants believe that no other landlord was criminally charged with violation of the Ordinance absent a prior office hearing. During discovery, the City Attorney was asked if anyone else was charged without a hearing. They responded that there *may* have been two other cases in addition to this one where no hearing was held.[28] However, the files on these two other cases either do not exist or have been "lost."

4. The People broke their promise to give Defendants a hearing.

This case presents the outrageous situation where Defendants first sued the City seeking to invalidate a novel ordinance, and then the City turned around and brought criminal charges for violation of the challenged Ordinance. (As is demonstrated in Section V *infra,* the law prohibits such prosecutions.) On October 2, 1978, Defendants brought civil suit challenging the Moratorium Ordinance as violative of the due process and other constitutional guarantees. The City Attorney represented the City of Los Angeles in that action. On February 26, 1979, the City filed this instant criminal action against these Defendants. At present, there is no direct evidence that this filing was in retaliation for Defendants' civil declaratory relief action, but, in view of the facts previously discussed, this conclusion is certainly a logical and permissible inference.

---

[28] *See* Exhibit W of Defendants' Pretrial Exhibits, at p. 2, ¶ 4. *See also* Exhibit DD*.

Moreover, at the hearing on the request for a temporary restraining order in the civil case, Deputy City Attorney Claudia McGee Henry promised the Court that no criminal charges would be filed against these Defendants without a prior informal hearing. As the People now admit, no such hearing was afforded these Defendants. *See* Exhibit W, at p. 1, ¶ 1 (c.).

Finally, Exhibit FF of Defendants' Pretrial Exhibits is a copy of an article that appeared in the Los Angeles Times on October 14, 1981 and Exhibit GG is a copy of the first and fourth pages of a report of the Community Development Department to The Governmental Operations Committee of the Los Angeles City Council dated April 11, 1980. Both of these exhibits cite statistics which indicate that the City's standard practice is to afford notice and an informal hearing to suspected violators of the rent control ordinances prior to filing criminal charges, and that 98% of all such cases are resolved through these hearings. Under the circumstances, where there is a policy to conduct informal hearings on suspected violations of the rent control laws prior to criminal action, and a specific promise was made by the City Attorney that this procedure would be followed, the evidence is overwhelming that this prosection was undertaken to punish Defendants for exercising their constitutional rights to oppose rent control politically and challenge such legislation in court.

C. **Conclusion**

Whenever an individual protests a law, he draws attention to himself, and often times is subjected to close government scrutiny. The protest may seem relatively insignifiant, as where a citizen refuses to disclose information to a census taker. *See U.S. v. Steele,* 461 F.2d 1148 (9th Cir. 1972) (where a defendant's conviction for refusing to answer questions on a census form was

reversed because it appeared the government maintained a file on defendant's public opposition to the census process). Or such protest may generate more notoriety, as organized resistance does to induction into the armed forces. *United States v. Falk,* 479 F.2d 616 (7th Cir. 1973). But regardless of the degree of protest to laws, it is improper criminally to prosecute an individual simply because he has exercised constitutional rights to protest laws he finds objectionable. That is the situation presented here; the proper remedy is dismissal of the action.

[Remaining Arguments omitted.]